No. 83-1602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHESTER A. WILK, D.C.; JAMES W. BRYDEN, D.C.; PATRICIA B. ARTHUR, D.C.; STEVEN G. LUMSDEN, D.C.; and MICHAEL D. PEDIGO, D.C.

Petitioners, Cross-Respondents,

v.

AMERICAN MEDICAL ASSOCIATION, AMERICAN HOSPITAL ASSOCIATION, AMERICAN COLLEGE OF SURGEONS, AMERICAN COLLEGE OF PHYSICIANS, JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, AMERICAN COLLEGE OF RADIOLOGY, AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, ILLINOIS STATE MEDICAL SOCIETY, H. DOYL TAYLOR, JOSEPH A. SABATIER, M.D., H. THOMAS BALLANTINE, M.D., and JAMES H. SAMMONS, M.D.

Respondents, Cross-Petitioners.

ON CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONSE TO CROSS-PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

Petitioners have no objection to a complete review of every issue naturally attendant the four issues raised in the basic Petition for Certiorari. The two issues raised in the conditional Cross-Petition, however, are simply not real issues flowing from the opinion of the court of appeals.

Petitioners and Cross-Petitioners believe the underlying case is of extreme importance both to the administration of the antitrust laws in the health care field and to numerous pending cases throughout the United States that are awaiting early resolution of the legal issues presented in the main Petition. Respondents' positions on the unusual importance of this case are quoted at page 3 of Petitioners' Reply Brief on the pending Petition for Certiorari. Petitioners are in full agreement with those positions.

II. STATEMENT OF THE CASE

The Statement of the Case is found on pages 3-13 of the Petition for Certiorari. Neither party quarrels with the factual overview set forth in the opinion of the court of appeals. A condensed version includes the following.

On November 2-3, 1963 the AMA organized and funded a committee, the "prime mission" of which was "first the containment of chiropractic and ultimately, the elimination of chiropractic." Pet. App. 6, 75. This "mission" appears in numerous AMA documents in evidence. After investigation, the AMA settled on a boycott of chiropractic to implement the stated goal and enlisted the support of the other defendants. The boycott was necessary because the committee had determined that "one of the more surprising items brought to the attention of the committee is reported to be professional cooperation and association between doctors of medicine and these [chiropractors]." PX 174 (1966 letter of AMA committee to all affiliated state, county, and local medical societies, and all medical specialty societies).

This horizontal group boycott was undertaken directly in defiance of state legislatures and prohibited all professional contact between medical physicians, hospitals controlled by them, and chiropractors. The trial court record on this point is irrefutable as the following illustrative quotations demonstrate:

1. This is in answer to your letter of December 18 referring to a bill which may be passed in New Mexico that hospitals must accept chiropractors as members of the medical staff.

   You are absolutely correct—the unfortunate results of this most ill-advised legislation would be that the Joint Commission would withdraw and refuse accreditation of the hospital that had chiropractors on its medical staff.

PX 10A (letter of respondent JCAH to New Mexico hospital, dated January 9, 1973).

2. RESOLVED: That MSMS [Michigan State Medical Society] inform its membership that it is considered *unethical* by the AMA and, henceforth, by the MSMS *for a doctor of medicine to refer a patient to a chiropractor for any reason.*

PX 1291 (emphasis added) (dated May 23, 1973).

3. It might be wise to prohibit any contact of any kind, at any time, by persons at the Medical Center with any chiropractor.

PX 1626 (letter of respondent ISMS Chairman to University of Illinois College of Medicine, dated January 11, 1974).

4. Since I have not been associated with chiropractic in the past, I felt it necessary to contact the California Medical Association to make sure that our relationship to this time would not be a source of difficulty in the present or future. As it turns out, both the CMA and AMA consider it unethical to associate with chiropractors and, therefore, I will have to *reluctantly* discontinue performing X-rays on your patients.

PX 880 (January 23, 1974 letter of radiologist to chiropractor) (emphasis added).

The AMA even admitted, "The facts are that chiropractic has not grown in number under existing policy, whereas there is every evidence to believe that it would grow if AMA policy decisions were relaxed." PX 253, Pet. App. 65.

III. THE DECISION BELOW

The district court, while recognizing that a conspiracy existed (Pet. App. 51), allowed cross-petitioners to present evidence of their sincerity in believing that the boycott was necessary to protect the public health, welfare, and safety. This was done notwithstanding this Court's decision in *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978), and the admonition to defendant AMA in *American Medical Ass'n* v. *United States*, 130 F.2d 233, 244, 247-48, 249 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943):

> Appellants reassert—in support of their contention that their conduct was not in restraint of trade—a proposition urged on the earlier appeal, that their conduct was no more than a reasonable regulation of the practice of medicine. . . .
>
> . . . .
>
> In some instances professional groups have been charged by legislative fiat with powers and duties concerning professional education, licensure, discipline, removal of licensees from practice, and other related subjects. In such cases they act as agencies of government. Although some similar delegations of power have been made to the organized medical profession, there is no evidence of delegation of power to appellants, sufficient to authorize the conduct for which they have been convicted. In the absence thereof professional groups must abide by the general laws just as scrupulously as any private citizen or private corporation. It is in this setting that appellants were permitted to organize, to establish standards of

> professional conduct, to effect agreements for self-discipline and control. *There is a very real difference between the use of such self-discipline and an effort upon the part of such association to destroy competing professional or business groups or organizations.* . . . As we suggested in our earlier opinion, appellants have open to them always the safer and more kindly weapons of legitimate persuasion and reasoned argument, as means of preserving professional esprit de corps, winning public sentiment to their point of view or securing legislation. But they have no license to commit crime. When they go so far as to impose unreasonable restraints, they become subject to the prohibition of the Sherman Act. This then, represents a limit to professional group activities. If it is desired to extend them beyond this point, legislation is required for that purpose. . . .
>
> . . . .
>
> Neither the fact that the conspiracy may be intended to promote the public welfare, or that of the industry, nor the fact that it is designed to eliminate unfair, fraudulent and unlawful practices, is sufficient to avoid the penalties of the Sherman Act. (Emphasis added.)

On September 19, 1983, and in a supplemental opinion of October 25, 1983 (Pet. App. 1, 50), the U.S. Court of Appeals for the Seventh Circuit reversed the judgment based on a jury verdict in respondents' favor and remanded the case for a new trial. In doing so the court made three critical legal rulings:

1. that petitioners are not entitled to a *per se* instruction for the horizontal group boycott because (1) respondents-cross-petitioners are professional organizations; (2) the presence of a patient care motive; and (3) only boycotts intended to enforce price fixing agreements are *per se* illegal;

2. that the traditional antitrust Rule of Reason would be modified to permit respondents-cross-petitioners to prove a patient care defense after petitioners have proven that the horizontal group boycott, on balance, resulted in a significant restraint of competition; and

3. that fixing of a government expert review panel report is immune from antitrust consequences under the *Noerr-Pennington* doctrine.

IV. REASONS FOR DENYING THE CROSS-PETITION FOR CERTIORARI

Neither of the issues presented in the Cross-Petition accurately reflect action taken by the court of appeals in this case. The first issue presented is:

> Does the Rule of Reason require defendants to bear the burden of proof on any issue relevant to the competitive significance of the challenged conduct?

The Cross-Petition does not identify the action of the court of appeals to which reference is made. The omission is noteworthy.

The only time the court of appeals discussed a burden of "persuasion" as being on the respondents is on pages 34 and 35 of the court of appeals' opinion. Pet. App. 34-35. The "burden" involves the novel "patient care" defense which is allowed *after* petitioners have proven that the horizontal group boycott has, on balance, resulted in a significant restraint of competition. The unique "patient care" defense was stated by the court of appeals to be "a value independent of the values attributed to unrestrained competition." Pet. App. 24. The court of appeals also stated its reasons for not believing that the "patient care" evidence presented met the "severely limited function" of "background" evidence allowed under *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918). Pet. App. 29-31.

Hence, the first question posed in the Cross-Petition is insubstantial for two reasons:

1. the burden of persuasion is for a novel defense unrelated to competitive effect; and

2. the defense itself is challenged in the main Petition for Certiorari as being contrary to established law in this Court and other circuit courts of appeal. For example, this Court recently stated:

> Thus we reject the view of the District Court that the legality of an arrangement of this kind turns on whether it was adopted for the purpose of improving *patient care*. . . . In the past, we have refused to tolerate manifestly anticompetitive conduct simply because the health care industry is involved.

Jefferson Parish Hospital v. *Hyde*, 1984-1 Trade Cas. (CCH) ¶ 65,908, n. 41, n. 42 (1984) (emphasis added) (citing, *inter alia, American Medical Ass'n* v. *United States*, 317 U.S. 519, 528-29 (1943)).

The second question posed by the Cross-Petition is:

> Does the Rule of Reason require that conduct be found to violate the Sherman Act unless it is both reasonable *and* the least restrictive alternative available to defendants?

The second issue does not flow from the court of appeals' decision. According to the Seventh Circuit, it is only after a preliminary finding that cross-petitioners' horizontal group boycott, on balance, restrains competition (the normal Sherman Act Rule of Reason test) that the new "patient care" defense even becomes relevant. Pet. App. 34-35. As a matter of law, however, that preliminary factual finding means that the conspiracy was definitionally "*un*reasonable" within the meaning of the Rule of Reason. Hence, the second question posed has no basis in the court of appeals' decision.

Moreover, the "least restrictive" alternative test is an accepted component of Rule of Reason analysis. In *United States* v. *Realty Multi-list, Inc.*, 629 F.2d 1351, 1375 (5th Cir. 1980), the court stated:

> Second, the requirements of the rules themselves must be reasonably necessary to the accomplishment of the legitimate goals and narrowly tailored to that end. *Marin County Board of Realtors, supra,* 1976-1 Trade Cases at 68,901. *See, e.g., Hatley, supra,* 552 F.2d at 652-653; *McQuade, supra,* 467 F.2d at 188; *Gamco, supra,* 194 F.2d at 487-488. *See generally* L. Sullivan, Antitrust 255 (1977); R. Bork, The Antitrust Paradox 335-337 (1978). *See also id.* at 278-279; L. Sullivan, Antitrust § 88 (1977). When the rules fail to measure up to these standards, the justification asserted for them fails. They have, in essence, an anticompetitive effect which has no countervailing procompetitive benefit.

V. CONCLUSION

The issues presented in the conditional Cross-Petition are non-issues. The four substantial issues set forth in the Petition For Certiorari encompass the major legal rulings of the court of appeals that are in conflict with this Court's and other circuit courts of appeals' precedent.

Does the *per se* rule apply to horizontal group boycotts in the health care field? May a conspiratorial effort to eliminate a licensed competitive health care profession through a group boycott be excused if the perpetrators can prove a "patient care" motive?

The conditional Cross-Petition should be denied. The Petition For Certiorari should be granted on the four issues presented and all matters naturally encompassed therein.

Respectfully submitted,

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